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CASES CITED.

STATUTES, CONSTITUTION, CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 278

ROGER TOUHY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petition for *certiorari* states and discusses the full substance of petitioner's claims insofar as they are founded upon his assertion of alleged matters of fact. This Statement does not duplicate that presentation. It is intended merely to state in summary fashion those facts that fairly delineate the questions that petitioner seeks to present to this court.

In 1934 petitioner Touhy and seven other men (Stevens, Kator, Banghart, McFadden, Sharkey and Connors) were

convicted by a jury in the criminal court of Cook County, Illinois, of kidnapping John Factor for ransom. Petitioner's term of imprisonment, which was fixed by the jury under the applicable Illinois statutes,[1] was 99 years. (A previous jury had disagreed and had been discharged.)

The Supreme Court of Illinois affirmed upon a record that contained a bill of exceptions setting forth all of the evidence at the trial. The opinion of affirmance is reported as *People* v. *Touhy*, 361 Ill. 332, and, not having been printed by petitioner, is reprinted in full as Appendix I to this brief, *post*, pp. 20-38.

Petitioner, who contended at his trial and has since maintained that he was the victim of a "frameup" engineered by Factor in order to avoid extradition to England on charges of fraudulently obtaining large sums of money from British investors, has made several efforts to assert his charges of such "frameup" by petitions for *habeas corpus* in the State and Federal courts.

Illinois concedes that under her mode of judicature, *habeas corpus* is not an appropriate means of asserting matter *dehors* the record of original conviction unless such matter was known to the trial court at the time that sentence was imposed. Therefore Illinois draws no conclusion adverse to petitioner from the fact that he has been denied a hearing upon *habeas corpus* in Illinois.[2]

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[1] Cahill's Revised Statutes, 1933, Ch. 38, par. 379.

[2] The point is not material in the instant case but in order to keep Illinois' position clear and constant in this court with respect to the avalanche of prisoners' charges of illegal extra-judicial elements in obtaining their convictions, we state that *habeas corpus* would be appropriate in Illinois if matter not appearing of record *but known to the trial court at the time of the imposition of sentence* resulted in a denial of due process, even though the record might be "fair upon its face". See *U. S. ex rel. Tony Marino* v. *Ragen*, No. 1382, October Term, 1946, pending before this court at the time that this brief is written, in which it appeared that petitioner, *with the knowledge of the trial court*, pleaded guilty to murder and waived counsel when petitioner could speak only a foreign language and the only interpreter afforded was the officer who had taken his confession. In this case Illinois' Attorney General, conceding the propriety of *habeas corpus* in a State circuit court, has confessed error and has consented to the discharge of petitioner.

In December of 1946, a little over twelve years after petitioner and his co-defendants had been convicted of and sentenced for the kidnapping, petitioner filed the instant "petition for writ of error *coram nobis*" in the criminal court of Cook County. The Illinois Supreme Court, adhering to its holding that the common law writ had been superseded by a statutory motion in lieu thereof, treated the petition as such a motion.[3]

The contents of the petition for writ of error *coram nobis*, besides appearing in full in the transcript (Tr. pp. 2 through 94), are set forth in essential substance in the petition and brief for *certiorari* in this court. We do not reproduce those contents. But the following summary statement is sufficient fairly and clearly to pose the constitutional questions sought to be presented here:

The petition, which is highly argumentative and contains a brief under the style of "Suggestions", reiterates petitioner's claim that he is innocent of the kidnapping, repeats petitioner's claim that Factor, in order to escape extradition to England, probably "kidnapped himself" and that he laid the blame for his kidnapping, real or imaginary, upon petitioner and his co-defendants because petitioner had been charged with the kidnapping of a man named Hamm in the Minnesota twin cities and because petitioner's and his co-defendants' reputations were more vulnerable to a charge of kidnapping than would have been the reputations of citizens who had not faced similar charges before.

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[3] "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years." (Ill. Rev. Stats. 1945, Ch. 110, par. 196.)

The petition for writ of error *coram nobis* in the criminal court says that in October, 1934, "Factor told Thomas C. McConnell, a Chicago lawyer, that he (Factor) had not been able to see anyone during the holding for ransom, on account of a bandage over his eyes, but that he swore to the identification of Touhy anyway." The petition further says that "petitioner learned of Factor's confession for the first time within the past few months" when his counsel "informed him that he learned of it for the first time in October, 1945, but counsel did not communicate this to the petitioner until some time later. These facts," the petition says, "have never before been disclosed to any court" (Tr. pp. 2-3).

The petition was not supported by any affidavit from McConnell or from anyone else except petitioner; nor does it excuse or explain the failure to produce that affidavit. (Tr. p. 77; Pet. p. 3.) Petitioner does not even supply the affidavit of the counsel who claims to have heard McConnell's statement that Factor recanted. Neither the petitioner nor any affidavit from his counsel suggest why McConnell should have withheld this statement, vital if true, from a time only shortly after petitioner's first trial until a few months ago, or for a period of twelve years.

The petition also recanvasses, in detail not reproduced in this statement, petitioner's contentions that the evidence at the original trial was not demonstrative of his guilt if indeed it was not wholly flimsy and insubstantial, asserts petitioner's innocence and invokes Illinois' constitutional provisions and the Fourteenth Amendment to the Constitution of the United States.

The State filed a demurrer to the petition and a plea of the five-year statute of limitations embodied in the *coram nobis* provisions of the Practice Act. The trial court ren-

dered a written opinion (Tr. 111-113) sustaining the demurrer under the plea of the statute of limitations and entered a judgment in accordance with the opinion (Tr. 113).

The Substance of the Illinois Supreme Court's Opinion and the Bases of its Decision.

The Illinois Supreme Court affirmed the trial court's judgment in a unanimous opinion delivered by Mr. Justice Wilson, reported as *People* v. *Touhy*, 397 Ill. 19, and reprinted as an appendix to the petition for *certiorari* appearing at pages 11-19 as well as in the transcript at pages 115-122. In this brief all page references to this opinion will be keyed to the opinion as printed by way of appendix to the petition for *certiorari* here.

As we have noted above, the Illinois Supreme Court, although recognizing that "petitioner captions his pleading a 'Petition for Writ of Error *Coram Nobis*,'" treated it "as a motion in the nature of a writ of error *coram nobis*" (Appx. to Ptn., p. 13). The court affirmed the trial court on three separate and distinct grounds:

1. The Supreme Court held that the petition was insufficient under Illinois' canons of *coram nobis* procedure because it was not supported by any affidavits other than the petitioner's formal verification and jurat. The court said (Appx. to Ptn., p. 18):

> "The petition is not supported by affidavits of either the lawyer to whom John Factor is alleged to have stated that he committed perjury upon the trial in the kidnapping case, or of Factor himself. The allegations, so far as the alleged false testimony of Factor is concerned, are hearsay statements of the highest degree. We do not regard the allegations in the petition as having been taken as true, even for the purpose of disposing of the demurrer."

2. The court held that *coram nobis* is not available to correct judgments in criminal cases merely because they rest upon perjured testimony unless due process is denied by official complicity in the subornation or presentation of the perjury. The court said (Appx. to Ptn., p. 19):

> "Irrespective of whether the allegations of the petition be taken as true for the sole purpose of disposing of the demurrer, the contention is not well taken that the common-law writ of error *coram nobis,* or its statutory substitute in this State, is available as a remedy for newly discovered evidence or for alleged perjured testimony. We have this day, in *People* v. *Gleitsman,* No. 29957 [396 Ill. 499], reaffirmed this court's adherence to the rule that writ of error *coram nobis* does not lie to correct false testimony, nor for newly discovered evidence." (Cf. *City of Chicago* v. *Nodek,* 202 Ill. 257, holding that where counsel for the City was implicated in the subornation of perjury, *coram nobis* was appropriate.)

3. The court also held that the petition was barred by the five-year statute of limitations provision embodied in the *coram nobis* provisions of the Practice Act since no duress, official interception of attempts to communicate with courts, or other official presentation of filing within the five-year period was shown. (Cf. *People* v. *Green,* 355 Ill. 468, holding, in accordance with this court's declarations, that where a prisoner's attempts to gain access to the courts within the period of limitations are intercepted by prison officials, the statute of limitations is tolled.)

Petitioner filed a petition for rehearing, which was denied (Tr. pp. 123-129).

The Entire Illinois Supreme Court Record Is Not Before This Court.

In Illinois, *coram nobis* proceedings, whether in civil or criminal cases, are a part of the continuing record of the original suit, action or proceeding in which they are filed. (The *coram nobis* provisions cited and quoted in full *ante*, p. 3.) Therefore a complete record of the case of *People* v. *Touhy*, Criminal Court No. 71236, would be comprised of the Supreme Court's record upon the original writ of error (*People* v. *Touhy*, 361 Ill. 332, First Case), as well as the transcript of the record in the instant proceeding.

Moreover it appears that, although the Supreme Court was not bound to do so under its practice, it did in fact take cognizance of petitioner's original application for *habeas corpus* in that court. The court's reference to the original petition for writ of *habeas corpus* appears at page 13 of the appendix to petition for *certiorari* and is reprinted in the margin.[4]

Therefore petitioner has not brought to this court the full substance of the matters of record that were before the Illinois Supreme Court and cognizable by it in this proceeding.

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[4] "An examination of the petition for *habeas corpus* filed in this court, more than eight years before instituting the present action, discloses that Touhy alleged Factor's testimony in the trial upon the indictment for kidnapping was false, and also, that Costner committed perjury upon the trial. He averred that knowledge of the facts alleged first came to him immediately preceding February 14, 1938. The petition for *habeas corpus* was supported by eleven affidavits. The present petition for a writ of error *coram nobis* is not supported by a single affidavit."

The Questions Presented.

The record presents the following questions:

1. Does the Illinois Supreme Court's holding that the petition was properly dismissed because it was not supported by affidavits of the witnesses whom it named, the absence of such affidavits being neither explained nor excused, constitute an "adequate non-federal ground of decision" requiring dismissal of this petition?

2. May this court properly entertain this cause in the absence of that part of the record that was made prior to the affirmance of the original conviction?

The following questions do not arise if, as we contend, the Illinois Supreme Court's decision rests upon the adequate non-federal ground that the unexplained absence of supporting affidavits justified, under Illinois procedure, a denial of the petition or if this court holds, as we say that it should, that it does not have before it a sufficient record to decide the questions presented.

But if this court could say that there is no adequate non-federal basis of decision, grounded in Illinois procedure, and if this court could consider this case upon the present fragmentary record, then the following questions would arise:

3. Did the Illinois Supreme Court deny federal due process by holding that a conviction obtained by perjury is not tainted with lack of due process unless there be complicity upon the part of State officials in suborning or presenting the perjured testimony?

4. If petitioner's application for relief in the nature of *coram nobis* had otherwise been appropriate, did the Illinois Supreme Court err in holding that Illinois may validly limit the time for the assertion of petitioner's claims by a five-year statute of limitations?

ARGUMENT.

I.

The Illinois Supreme Court's decision rests upon adequate non-federal grounds and upon a view of matters of record in that court that are not before this court. Therefore this court lacks jurisdiction to review.

A.

This court lacks jurisdiction where the Illinois Court's decision rests upon an adequate non-federal ground.

Where a state court's denial of a hearing upon a prisoner's charges that he is confined without due process rests upon a ground of state procedure that is not *per se* federally unconstitutional, this court lacks jurisdiction to review on *certiorari* the state court's decision. (*White* v. *Ragen*, 324 U. S. 760, decided together with *Lutz* v. *Ragen*, id.)

B.

The petition for writ of error coram nobis was insufficient under Illinois' modes of procedure and upon a view of the entire record.

The Illinois Supreme Court, having before it the complete record of petitioner's original conviction (affirmed, *People* v. *Touhy*, 361 Ill. 332, reprinted in full, *Appendix to this Brief, post*) and likewise having before it his *habeas corpus* proceeding in that court, declared in language quoted in the Statement of the Case, *ante*, that the petition for *coram nobis* was properly denied because it was not supported by affidavits of the witnesses, including the witness

McConnell, whom it mentioned as ready to testify upon a hearing if one should be granted.

This is certainly not an unconstitutional requirement to lay upon a prisoner who, twelve years after his conviction of a very serious offense, seeks to reopen his case upon the basis of a recanting statement allegedly made more than twelve years before it is sought to be used.

This court's decision most nearly in point in this connection is *Hysler* v. *Florida*, 315 U. S. 411, cited by petitioner, (Ptnr's. Brief, p. 38). [The *Hysler* case is also authoritative upon other aspects of this case and is considered *post* in other connections.] In that case one Hysler had been convicted of murder and sentenced to death. After his conviction and sentence had been affirmed by the Supreme Court of Florida (132 Fla. 209), Hysler "petitioned the Supreme Court of Florida for permission to apply to the Circuit Court of Duval County, Florida (the court before which he was originally tried) for writ of *coram nobis*" (p. 415).

"Hysler's claim before the Supreme Court of Florida" this court said through Mr. Justice Frankfurter, "was that Baker repudiated his testimony insofar as it implicated Hysler and that he now named another man as the instigator of the crime. Considering the fact that this repudiation came four years after leaden-footed justice had reached the end of the familiar trail of dilatory procedure, and that Baker now pointed to an instigator who was dead, the Supreme Court of Florida had every right and the plain duty to scrutinize this repudiation with a critical eye, in the light of its familiarity with the facts of this crime as they had been adduced in three trials, the voluminous records of which had been before that Court." (p. 417.)

In a note to the margin at this point, this court said:

> "In denying Hysler's application, the Supreme Court of Florida specifically stated that it was taking judicial cognizance of its own records. 146 Fla. 593, 594-95, 1 So. 2d 628."

The principal particulars in which the *Hysler* case differs from the instant case militate against, not in favor of, petitioner in this case. In the *Hysler* case there was a specific charge that "third degree" methods had been applied to the witnesses upon whom Hysler's conviction in part depended. No such charge is made in the instant case.

This court held that even if Hysler's petition were to be read as importing a charge of denial of due process because of official complicity in the "framing" of Hysler, the Florida Court was justified in considering what this court called the "substantiality" of Hysler's claim in point of its probability "on the basis of all that was before it, namely, the petition and its accompanying affidavits" (there are no "accompanying affidavits" in the instant case except petitioner's verification of matters which he says are not within his personal knowledge) *"and the records of the prior cases arising out of the same crime."*

This court continues at page 421:

> "• • • The Court had to judge the substantiality of this claim on the basis of all that was before it, namely, the petition with its accompanying affidavits and the records of prior cases arising out of the same crime. The Court concluded that Hysler's proof did not make out a *prima facie* case for asking the trial court to reconsider its judgment of conviction. However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. • • •"

The Illinois Supreme Court's opinion affirming petitioner's and his co-defendants' confession, not supplied by petitioner but reprinted in an appendix to this brief, plainly discloses that petitioner's conviction by no means rested upon the testimony of Factor alone. Co-defendants implicated him in the kidnapping. Touhy does indeed claim that these co-defendants were perjurers and were motivated by a desire to receive consideration. But this claim was thoroughly litigated at the time of the petitioner's original trial. This court denied *certiorari.*

Petitioner sought to reopen this case solely upon his personal and entirely unsupported assertion that a lawyer heard Factor recant his testimony in 1934, kept the fact of this recantation, vital if true, secret from petitioner, for about eleven or twelve years, and then divulged it. The lawyer's affidavit is not attached to the petition; nor is its absence excused, explained or in any way accounted for.

The Supreme Court of Illinois, in accordance with this court's holding in the *Hysler* case, 315 U. S. 411, read petitioner's application in the light of the record of petitioner's original conviction, which was a part of the record of this same case. It also considered (though it would not have been bound to do so under its practice) affidavits that accompanied petitioner's original application for *habeas corpus* in that case. Upon its view of this entire record, it denied petitioner's application. Certainly that denial does not raise any question sufficient to evoke this court's writ of *certiorari.*

II.

Even if the Illinois Supreme Court had been bound to accept petitioner's allegations as true, they did not state a case of denial of due process.

The logic of constitutional principles and this court's decisions alike affirm the doctrine that due process is accorded when a defendant is fairly prosecuted by honest officials before an impartial court and an impartial jury, with no complicity on the part of any public official in the subornation of perjury or other ulterior methods of prosecution; and that this is true even though a witness may have testified falsely. It is the purity of public officials and of the tribunal, not that of non-official witnesses, that is required by due process.

Complicity of public officials in obtaining a conviction by perjurious or other unfair evidence denies due process. (*Mooney* v. *Holohan*, 294 U. S. 103.) But, conversely, absent misconduct upon the part of the state through its officers, the state does not deny due process because an honest prosecutor calls and an honest jury believes one who is later shown to be a perjurer. (See cases discussed below.)

The necessity that public officials must be implicated in the subornation of perjury or other fabrication of evidence in order to convict the state of lack of due process is made clear beyond peradventure by *Hysler* v. *Florida*, 315 U. S. 411, already cited for other propositions to this case under Point I, *ante*. In the *Hysler* case, this court said at page 420:

> "* * * In his final affidavit on April 9, Baker returns to the alleged promise of the State's Attorney that he would not 'burn' him. But there is this time no sug-

> gestion that the prosecutor induced or knew of any false testimony by Baker."

On page 419, the court further noted as a basis for affirming the Florida court, that "Even in this second affidavit [of the recanting witness Baker], there is no hint that the prosecutor had any knowledge of the falsity of his implication of Hysler." The court notices the following language from the opinion of the Florida Supreme Court:

> "The allegations of the petition do not show that the prosecuting attorney had any guilty knowledge of the alleged maltreatment of the witness [Baker] or that the alleged falsity of the testimony of the witness Baker was known to the prosecuting officer."

The dissenting opinion in the *Hysler* case, written by Mr. Justice Black and concurred in by Mr. Justice Douglas and Mr. Justice Murphy, likewise proceeded upon the assumption that misconduct on the part of public officials, not mere perjury on the part of a non-official witness, was necessary to vitiate the conviction for lack of due process. The dissenting opinion contains the following very significant statement by Mr. Justice Black, at page 423:

> "* * * I do not, however, regard this as a proper occasion to determine whether the rule of *Mooney* v. *Holohan* applies only where the guilty knowledge is that of 'the prosecuting officer' *and not any other responsible official.* * * *" (Emphasis supplied.)

The dissenting Justices in the *Hysler* case thought that Hysler's petition contained sufficient averments to call for a trial on the question whether the prosecutors introduced confessions which had been "wrung from the accused or his accomplices by third degree methods." No such charge is seriously made in the instant case. Thus the entire court agreed in regarding *official* misconduct as a necessary concomitant in denial of due process by the "State", to which alone the text of the Fourteenth Amendment applies.

Lisenba v. *California,* 314 U. S. 219, is likewise incisively pertinent. In that case this court held that a conviction resting upon testimony of accomplices, which testimony was given after inducements in the form of promises of leniency, did not deny due process.

The view that the lack of due process, when it exists in the case of a conviction resting on false or otherwise illicit evidence, must consist in the knowing fabrication or use of such false or illicit evidence by public officials is not a mere technical shibboleth to keep innocent men in the penitentiary. It is grounded upon the philosophical reflection that, while proved complicity of public officials in sending an innocent man to the penitentiary is ground for upsetting a conviction years after it has occurred, the protection of society from violence and other crime at the hands of its more vicious citizens demands that persons who have once been fairly tried by an impartial tribunal shall not be at liberty, years after their conviction, to procure recantation or other contradiction of the testimony of one of the witnesses and thereby compel society to retry the whole case after other witnesses have died, disappeared or forgotten the facts.

If a mere recantation of a witness is sufficient to open the doors of the penitentiary, then society is very much at the mercy of any convict who, though he makes no charge against the government that has convicted him, can procure evidence of recantation or other showing of perjury on the part of one of many witnesses who had testified against him.

There are many rules of evidence that, like the rule against hearsay evidence, close the eyes and ears of courts to evidence that, though it may be convincing and clearly true in a given case, is of a kind or *genus* that is inherently so easy of fabrication and so difficult of disproof that en-

lightened policy demands exclusion of such evidence as a type of *genus*. This is indeed the basis of nearly all of the exclusionary principles law of evidence except that which excludes proofs on the ground that they are irrelevant.

The enforcement of such a rule of evidence does not work a denial of due process of law.[5]

III.

Illinois may properly limit the time in which petitioner may assert claims of lack of due process in state courts.

This court need not, indeed, it can not properly reach in this case the question whether Illinois might limit the time of the assertion of federal constitutional claims by a statute of limitations shorter than that applied to the assertion of claims arising under the state constitution or other state law. Nor can this court properly reach the question whether, if Illinois closes her doors to affirmative legal proceeding at the instance of petitioner after five years, federal courts must or may, in the absence of positive congressional enactment to the contrary, apply the Illinois statute of limitations.

If this court should hold, contrary to the propositions advanced under Points I and II, *ante*, that the instant petition for *coram nobis* otherwise effectively charged denial of federal due process, only the following very narrow question would arise:

> May Illinois, by a statute of limitations not *per se* unreasonable in the length of time that it prescribes,

[5] Petitioner does not effectively charge the public officials in this case with complicity in his alleged "railroading." His petition does assert the conjecture that the public officials "could have known" of the alleged falsity of Factor's testimony. This averment is not only a mere conclusion. It is apparently groundless surmise. We therefore do not treat seriously this purely opinionative utterance of petitioner's pleader in the trial court.

limit the period within which affirmative action may be commenced by an Illinois convict to arraign Illinos authorities upon charges of denial of due process, or may Illinois remit such convicts to the vindication of their alleged federal rights in the federal courts?

In civil cases the law is plain that, while a state may not invidiously discriminate against causes of action having their genesis under federal laws, state statutes of limitation in general are applicable to action having their genesis in federal substantive law. Indeed this court holds that even where a civil action arises under a federal statute and is brought in the federal courts, it will be presumed that Congress intended such actions to be limited by the statute of limitations in the state where the federal court sits. *Pufahl* v. *Parks Estate,* 299 U. S. 217.[6]

This court has recently in effect sustained the invocation of a period of limitations for the assertion of substantial federal rights even though only federal statutes and federal courts were involved. In *Sunal* v. *Large,* ... U. S. ..., October Term, 1946, No. 535 (not yet officially reported), this court had before it the claims of an alleged conscientious objector that he had been denied the right to interpose proof of his religious convictions as a defense to prosecution under the Selective Service Act. He had

[6] It is not absolutely certain that the federal government can impose upon state courts the affirmative duty of entertaining any action for the vindication of purely federal rights. (Cf. *Kentucky* v. *Dennison,* 65 U. S. 66, holding that the act of Congress imposing duties upon a state governor is void.) One might inquire, for instance, what would be the result if a state failed to appropriate funds for the summoning of jurors, the pay of judicial and ministerial officers of the court and the like for service in actions instituted under federal legislation. This of course is very different from saying that, if the state does entertain an action based upon either state or federal rights, the state must accord due process in such action and that it must admit any defenses, e.g., a plea of discharge in bankruptcy, or a defense under the Soldiers' and Sailors' Relief Act, authorized by Congress.

been convicted in a district court and had not prosecuted an appeal. After the time for appeal had expired he sought *habeas corpus* on the ground, *inter alia*, that his time for appeal was barred by the five-day period within which a notice of appeal might be filed. (Rule III of Criminal Appeals Rules of 1933, 292 U. S. 661, enlarged to ten days by Rule 37 of Federal Rules of Criminal Procedure effective Mar. 21, 1946, 327 U. S. 857.)

This court held that inasmuch as he had not appealed within five days, his right to review of an admittedly substantial claim of federal constitutional rights was barred.

It is true that there is no statute of limitations explicitly applicable to *habeas corpus* in the federal courts; and it may well be that a state statute of limitations would not bind a district court where the Fourteenth Amendment was invoked by a state prisoner. But nevertheless the net result of the *Sunal* case was to limit by a period of five days the time in which an alleged conscientious objector could assert his claim of rights under the Fourteenth Amendment to the Constitution of the United States as well as under the United States Habeas Corpus Act and under the express terms of the Selective Service Act.

It is indeed difficult to perceive how this court could sanction a five-day period of limitations created by this court's own rules of criminal procedure as a constitutional inhibition upon the right of a federal prisoner to seek relief, yet strike down as unconstitutional a state's failure to entertain, after five years, affirmative action in the state court where the only rights claimed are federal rights and the federal courts are open for their assertion and vindication.

To the same effect precisely is *Goto* v. *Lane,* 265 U.S. 393, except that the period of limitation was not as brief as the five-day period involved in the *Sunal* case. In the *Goto* case, this court held that where a federal convict had failed to prosecute a writ of error within the time allowed by law, he was barred from asserting federal constitutional claims upon *habeas corpus.* And see also *Riddle* v. *Dyche,* 262 U. S. 333, to the same effect.

Of course these considerations are not pertinent if this court agrees with us (I) that the Illinois Supreme Court's decision rests upon an adequate non-federal ground and is based upon a record not before this court, or (II) that petitioner's allegations, even if taken as true do not effectively charge a denial of due process.

Conclusion.

For the reasons urged in this brief, it is respectfully submitted that the instant application for this court's writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX I.

People v. Touhy, et al.
361 Ill. 332.
No. 22789, 22864.
Supreme Court of Illinois.
June 14, 1935.
Rehearing Denied Oct. 2, 1935.

JONES, Justice.

Roger Touhy, Peter Stevens, Albert Kator, Hugh Basil Banghart, Edward McFadden, William Sharkey, and Charles Connors were indicted in the criminal court of Cook county upon a charge of kidnapping John Factor for ransom. Touhy, Stevens, Kator, and McFadden were tried before Judge Feinberg. At the close of the evidence a nolle was entered as to McFadden. The jury did not agree upon a verdict, and was discharged. On a second trial the plaintiffs in error were found guilty. Banghart was tried separately before Judge Steffen and found guilty. Each of the verdicts fixed the penalty at 99 years in the penitentiary. Judgments were entered on the respective verdicts, and writs of error sued out as to each. The causes were consolidated in this court, but later, upon Banghart's application, the consolidation was vacated and the writ of error in his case was dismissed. Sharkey and Connors are dead. Stevens is often referred to in the testimony as Gus Schafer. Banghart frequently went by the name of Larry Green. None of the defendants testified on the trial.

John Factor testified he was kidnapped on the night of June 30, 1933, while leaving the "Dells," a roadhouse in the northwest part of Cook county. His party consisted of his wife, his son Jerome, his brother-in-law, Harold Cohn, Mr. and Mrs. Epstein and their son, Mr. and Mrs. Hyman and their daughter Catherine, and Charles Redlick. They started for their homes about 1 o'clock a. m., leaving in three cars. One of the cars was driven by Jerome Factor, with Epstein and John Factor as passengers.

About a block and a half east of the Dells three cars containing about a dozen armed men approached the Factor car and forced it to the curb. Members of the Factor party who were following came up, and they were compelled to get out of their cars and line up along the roadway. Factor and Epstein were taken out of the car in which they were riding and put into a car of the kidnappers and were blindfolded. After going a short distance this car turned to the right and Epstein was allowed to go. Factor was kept that night and the next day in the basement of a house called the "Glenview house." The next night he was taken to a farmhouse and kept there until July 12, when he was released upon a payment of a large ransom.

The evidence for the people shows that while Factor was in the basement at the Glenview house one of the men removed the handkerchief blindfold and replaced it with adhesive tape. Factor got a look at a man standing opposite him and identified him as Kator. At the farmhouse he recognized Banghart by his voice. Factor was directed to write a letter to his wife and the blindfold was removed. While he was writing the letter two men stood in front of the table with a blanket partly concealing them. He identified one of them as Roger Touhy. On the night before his release they told him his wife had $70,000 and asked if he could get $50,000 more provided they would release him. He agreed to get it in about a week or ten days. They talked over the method of sending the money, and arrangements were made to have Costner, one of the kidnappers, telephone Factor about it. Factor did not know Costner's name at that time but afterwards learned it in Baltimore. He identified Schafer and Sharkey as two of the men who captured him on Dempster street. After his release he received five or six telephone calls in reference to the balance of the ransom money. At one of the conversations arrangements were made for him to pay $15,000. Prior to that he had talked to Captain Gilbert, of the police, and two agents of the Department of Justice. They were always present with Factor during the telephone conversations. At the last telephone conversation it was agreed that the $15,000 should be sent by a messenger boy in a Checker cab. By arrangement with the authorities a dummy package was made up with $500

and given to two officers, one of whom was disguised as a Western Union messenger boy and the other as a taxi driver. They drove to an appointed place in Willow Springs and delivered the package to Banghart and Connors.

In August, after Factor was released, Captain Gilbert showed him a picture of Kator and told him he was an associate of Roger Touhy. Factor stated that it was the picture of the man he saw in the basement. In November he saw Kator after he was in custody. Factor identified the Glenview house as the house in the basement of which he was first held. He testified he was able to identify Touhy, Kator, Costner, and Banghart by their voices.

Jerome Factor identified a picture of Sharkey as one of the kidnappers. Mrs. Factor also identified it. Epstein and wife were unable to identify any of the kidnappers. James Reddick, Epstein's chauffeur, testified that he got a good look at one man's face and could recognize him, but had never seen the man since. He saw him about 10 o'clock that night at the Dells leaning against a car with a machine gun, and concluded he was one of the guards. He did not identify any of the other men. As he started out of the Dells yard with his party a car tried to beat him out. It was the car that cut Factor's car off.

Isaac Costner testified, in substance, that he came to Illinois from Tennessee between the 25th and 28th of June. He went to Park Ridge, Ill., to see Basil Banghart, whom he had known five or six years, and stayed with him that night. He knew, or became acquainted with, Touhy and his associates. He, Connors, Banghart, Touhy, Gus Schafer, and Kator frequented Jim Wagner's saloon. "The Touhy outfit" had two or three places to live. On the night of June 30 he was in one of their places. After he had gone to bed, three or four men, including Banghart, woke him up about 11 o'clock and said they wanted to grab Factor. He went with them to the Dells. They had three cars. He, Connors, Touhy, Schafer (Stevens), Sharkey, Banghart, Kator, Porkey Dillon, and some others whom he did not remember, were there. They parked their cars northwest of the Dells, on the roadway. A man who Banghart said was Silvers came out and reported on Factor. They stayed there some time, then drove out and parked their cars on the right side of Austin avenue, fac-

ing Dempster street. The same man again came over and described Factor and the car he would be in. When Factor and Epstein were captured Costner helped put them in one of the cars. Touhy and either Connors or Sharkey were in the back seat. When they took Factor into the house Costner stayed in the automobile. He slept at one of the Touhy houses that night. The next day he stayed with Factor in the basement of the house where the latter was confined. Two to four of the others were there, coming and going. About 10 o'clock that night they left in three cars, taking Factor along. Connors, Banghart, Touhy, Sharkey, Kator, Schafer, and some others whom he did not know, were there at that time. They went 50 or 60 miles, and close to midnight arrived at a farmhouse, where Factor was put to bed in a room on the second floor. Costner guarded him 10 or 12 days. Banghart and Touhy were there three or four times. Schafer, Kator, and Connors also came. In the presence of Banghart and Touhy, Factor wrote his wife that she should try to borrow up to $200,000, the price of his release. The men holding him were to get in touch with Dr. Soloway or Herman Garfield, with instructions how to deliver the money. Factor gave them his ring, his watch charm, and wrist watch as tokens to be delivered as proof that he was being held by those who were seeking ransom. After considerable negotiation, $70,000 was paid, and Factor agreed to pay $50,000 more for his release. Costner was to call him within two weeks. Factor was freed that night at La Grange. The next day Banghart gave Costner $2,400 in $20 bills and told him that was his share of the Factor money. According to the previous arrangement, Costner called Factor at two or three places on different occasions demanding the additional payment. Factor claimed it was difficult to get the money, and this conversation was reported back. On August 14, Factor agreed to pay $15,000 that afternoon at a place near the New York Golf Club, on the West Side, but did not do so. After three or four days Costner went to Tennessee and Banghart followed later. Then they went to Baltimore and lived there for a while. Costner was arrested on charges of robbery. Factor, learning of the arrest, went to Baltimore with a police officer. To the authorities in Baltimore Costner denied knowing anything of the kidnapping of Factor, but on be-

ing returned to Chicago he admitted his guilt and testified that the prosecuting attorney told him he would get some consideration for his testimony.

Walter Henrichsen testified that he rented the Glenview house at Touhy's direction. Prior to June 30 he was a guard in Touhy's yard at a salary of $40 a week. He did not go to work on July 1 or 2, and did not see Touhy from June 30 to July 4. He first met Costner the latter part of June, and saw him once or twice in July with Banghart in Wagner's basement, near Touhy's home. He also testified to several meetings of Touhy and his associates and armed trips at night with them. On July 5 and 6, at Touhy's direction, he picked Silvers up at the Dells and took him to the Commercial Club, where conferences were had with the defendants and some other associates. On July 12, about 12:30 or 1:00 o'clock, he and Jimmy Tribbles, accompanied by three other cars, drove to Twenty-Second street, near Wolf road, to collect the ransom for Factor. As he remembered, Dillon drove one car, Kator drove another, and Sharkey drove the one he was in. They met a man there who he believed was Dr. Soloway and received a suitcase from him containing the ransom. Tribbles had a machine gun and a pistol. They then went back to the Glenview house. He got out and brought Touhy over, telling him of the trip to Twenty-Second street. Tribbles took the suitcase into the house. Schafer, Banghart, Kator, Sharkey, Dillon, Connors, and another fellow that he did not know, were there. That night he and Sharkey were out together until about 1 o'clock. Sharkey was drinking heavily. The next day, Kator, Schafer, Connors, Tom Burns, Eddie McFadden, Tribbles, and Touhy were at Dillon's place all day, drinking beer. On July 14, at Dillon's, Touhy gave him $1,000 in $10 and $20 bills and told him he could buy a new car. At the first trial he testified that he had no idea the $1,000 could possibly be any part of the ransom money and did not tell anything about going out with Tribbles and Sharkey to get the suitcase, and did not mention Costner. He explained that he did not then know Costner's name and was trying to shield himself. It was not unusual for him to get money from Touhy to buy a car, and he had bought a number of them in the same way.

James Wagner testified that in May, 1933, he was in the roadhouse business about two and one-half miles north of Des Plaines on River road, about 600 feet south of where Touhy lived. Prior to that he had worked about six years for Touhy, driving a beer truck. Touhy and his associates frequented his place of business. On the afternoon of June 30, Kator, Touhy, Henrichsen, Schafer, Sharkey, Dillon, Connors, and Banghart were there. They came in about 3 o'clock and stayed until about 6:30. Henrichsen left about 6, came back about 7:30, and was still there at midnight. None of the others came back that night. On June 30 they talked in his presence, but he heard nothing about a plan to kidnap Factor.

Adeline Wagner, wife of James Wagner, testified she saw Touhy, Schafer, Kator, Sharkey, and McFadden leave her husband's place of business about 6:30 or a quarter to 7 o'clock on June 30. They left in about three cars.

Herman J. Garfield testified that on July 2 his telephone rang and somebody on the line said he was speaking for Factor and asked him to convey a message to Mrs. Factor demanding $200,000. Dr. Soloway, who lived at the Copeland Hotel, testified to a like communication.

Rudy Benitez, a bell boy at the Copeland Hotel, testified that on July 9, 1933, he received an envelope from a man whom he identified as Sharkey, with directions to deliver it to Dr. Soloway, and said there was no answer. The envelope contained something round inside. He delivered it at Dr. Soloway's door. On cross-examination he testified that he did not say at the former trial that Purvis told him he was going to show him the man that delivered the ring. Helen Kaylor, a court reporter, testified that he did make such a statement.

Dr. Solowoy testified that after several telephone communications on different days with the party demanding the ranson, it was agreed that he should deliver the $70,000. He followed directions, and on July 12 drove out Jackson boulevard to Des Plaines road, turned left to Twenty-Second street, and drove slowly to the right. A little car came up and one of the two men in it handed him a watch charm that belonged to Factor. The man had a machine gun in his lap and an automatic gun in his right hand. Dr. Soloway delivered the money and was

told that Factor would be released about 9 or 9:30 that night. He did not identify anybody with whom he communicated.

Edward McFadden, as to whom a nolle prosequi was entered, testified that he knew all of the defendants and was frequently at Touhy's house in Glenview, but that he never saw Costner in his life before the trial, and that he and Tribbles were in the Oak Park Hospital from the last Thursday in June until the second Saturday in July. He went to live at the Glenview house about the 15th or 16th of June. His son, Andrew McFadden, lived there. Neither Schafer nor Touhy came there.

Basil Banghart testified that he had been around Chicago from the latter part of June until the first part of July, 1933. During that time he did not see Costner, but that Costner came to his house in Park Ridge on July 19, 1933. He denied taking any part in the kidnapping of Factor or collecting the ransom money from Dr. Soloway. He was in Wagner's saloon a number of times, but Costner was not there. He fixed the date that Costner arrived in Chicago by reading in the paper the next morning about the arrest of Touhy and the men who were with him. In the early part of the evening of June 30 he was in Wagner's place. Touhy, Kator, Schafer, and Henrichsen were there. He thought Dillon was there. Connors and Tribbles were in a hospital guarding Tommy Touhy. At 10 or 11 o'clock he went home. The next morning he woke up rather late, when Costner came in the house. The witness corrected himself by saying he made a slip when he said Costner woke him up, for Costner was not there on July 1. He did not give Costner $2,400, and did not get any money along about that time, but lived on the money he got by stealing. On the evening of July 19, Costner unfolded a scheme to "shake Factor down" for more money, and said that he had heard Factor was supposed to pay off more money. He told Costner he would not be interested. They had conversations for a week or more about it. Costner told him that Factor was willing to pay off. They later met Factor, who told them he wanted to convince the government authorities and the crown attorneys that he had been kidnapped. He was to give $50,000 to "make it look good." It was to be

divided between Connors, Costner, and Banghart. Costner received $5,000 that day. Banghart made subsequent calls to Factor on the phone, and it was arranged that the money was to be delivered by two government men at Willow Springs. Costner told them the money would be brought to the place of contact in a cab by a Western Union messenger boy. Banghart and Connors drove to the place of contact and a package was handed to Banghart. The package proved to be a dummy containing $500. A police trap had been arranged, but Banghart and Connors escaped from it. Banghart admitted that in the state's attorney's office, before the trial, he denied knowing Factor, Roger Touhy, Tommy Touhy, Connors, Schafer, or Kator. Costner and Factor denied the meeting with Banghart, or any arrangement to send two friendly government men with $50,000 to make the kidnapping "look good".

Emily Ivins, a switchboard operator and a witness for the defense, testified she knew Mrs. Roger Touhy for fifteen years; that she lost her job on June 29 and the next day went out to the Touhy home, where she stayed until July 5. On the day she arrived she saw Touhy about 6 o'clock. He left right after dinner and returned about 11 or 11:30. They all sat on the front porch until they retired, about 4 o'clock in the morning. In rebuttal, Edward Schwabauer, a guard at Touhy's home, testified that on the night of June 30, 1933, he was in the yard all night, except about twenty minutes when he went next door to Wagner's for some beer. He did not see Touhy or Emily Ivins at the Touhy place and did not see Touhy around there the next night.

The material evidence has been set forth at length in this opinion because one of the grounds for reversal is that the defendants were not proved guilty beyond a reasonable doubt. That contention will be hereafter considered.

The defendants' attorney filed an affidavit alleging, among other things, that on the first trial, when the jury retired to consider their verdict, the judge orally instructed them that it was their duty to consult with their fellow jurors and arrive at an agreement, if possible; that after they had been out for a considerable time he sent them a written questionnaire requesting information as to the probability of an agreement, and that after they had been

out 25 hours he recalled them to the box and discharged them. It is claimed that the discharge of the jury was not with the consent of the defendants, and that it does not appear the jury could not agree upon a verdict. The defendants therefore say they had been in jeopardy, and they seek to interpose that defense. The record recites: "Jury return into open court and report they disagree. Order of court jury discharged from further deliberation in this cause and mis-trial ordered." It is not claimed that the jury were recalled to the box without previously informing the court of the disagreement. A jury in a criminal case may be discharged without a verdict whenever in the court's opinion there is manifest necessity for the discharge, or the ends of public justice require it. The exercise of that authority is within the sound discretion of the trial court and is not reviewable in the absence of abuse. Such abuse is not presumed by a court of review. People v. Simos, 345 Ill. 226, 178 N. E. 188; Dreyer v. People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869. The affidavit does not show any abuse of discretion.

An application for a change of venue from the trial judge was refused. The record shows that prior to the first trial, the defendants, upon their petition, obtained a change of venue from Judge Miller, one of the judges of the criminal court to whom the cause had been assigned. Section 26 of the Venue Act (Smith-Hurd Ann. St. c. 146, § 26), provides that no more than one change of venue shall be granted to the defendant or defendants. While the statute allowing a change of venue should be interpreted so as not to defeat the rights conferred (People v. Scott, 326 Ill. 327, 157 N. E. 247), it cannot be so construed as to contravene its express provisions. Where the language of a statute is plain and unambiguous there is no room for construction and it must be given effect by the courts. Levinson v. Home Bank & Trust Co., 337 Ill. 241, 169 N. E. 193; Downs v. Curry, 296 Ill. 277, 129 N. E. 761. In People v. McWilliams, 350 Ill. 628, 183 N. E. 582, we held that upon a proper showing the defendant was entitled to a change of venue after a reversal of his conviction, but in that case there had been no prior change of venue. That holding is not applicable to the facts in this case.

An application was also made for a change of venue from the county on the ground that there exists a preju-

dice of the inhabitants against the defendants; that the first knowledge of such prejudice came to them on the day the application was made; that Factor had been fighting extradition to England, and that although the United States Supreme Court had affirmed an extradition order he has been able to remain out of custody; that one of the defenses to the kidnapping charge is that Factor was not, in fact, kidnapped, but arranged the affair to interest public officials in keeping him in this country; that the services of certain public officials were enlisted to prevent his extradition; that the Chicago newspapers continually carry articles concerning their activities; that by the liberal use of money Factor has associated himself with powerful underworld characters known as the "syndicate," and has influenced certain Chicago newspapers to refrain from referring to him as "Jake the Barber" and to refer to him as John Factor, wealthy speculator; that the newspapers have assumed the guilt of the defendants, and because of the natural prejudice against the crime of kidnapping have poisoned the minds of the inhabitants of the county against them; that a gang war existed in Cook county and the syndicate endeavored to exterminate Touhy and his associates by assassination, and that if the cause is transferred to another county the influence which might be exerted by Factor, the newspapers and the syndicate would not be so effective.

If it be accepted as a fact that the newspapers assumed the guilt of the defendants, the affidavit did not set out what was published or what were the activities of officials, or state any fact or facts which tend to show prejudice on the part of the inhabitants of the county. It is not claimed that Factor's alleged connection with the so-called syndicate or the alleged attempt to exterminate the defendants was ever brought to the notice of anybody in Cook county, nor is it to be assumed that the inhabitants are susceptible to the influence of the syndicate or of any group of gangsters. Whether or not prejudice exists in the minds of the inhabitants of a county is a question of fact, to be determined in the sound discretion of the trial judge. People v. Katz, 356 Ill. 440, 190 N. E. 913; People v. Cobb, 343 Ill. 78, 174 N. E. 885. No abuse of that discretion was shown.

Touhy, Stevens, and McFadden filed a motion to suppress as evidence certain guns on the ground that they were illegally seized, in violation of their rights under the State and Federal Constitutions prohibiting unreasonable searches and seizures (Const. Ill. art. 2, § 6; Const. U. S. Amend. 4). The guns, consisting of five pistols and revolvers and one rifle, were seized in Wisconsin on July 19, 1933, by officers of that state after Touhy, Stevens, and McFadden were arrested for reckless driving and running their car into a telephone pole. The guns were taken from their car upon their arrest. The rule in this state is, that where officers of the state charged with the prosecution of crime, conduct, by virtue of their office, an unlawful search and seizure, the evidence thereby obtained is not admissible against the defendant. People v. Castree, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357; People v. Brocamp, 307 Ill. 448, 138 N. E. 728. The rule is not applied to evidence unlawfully obtained by others than state officers acting under color of authority from the state. People v. Castree, supra; People v. Paisley, 288 Ill. 310, 123 N. E. 573; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085. Likewise the provision of the Federal Constitution against unlawful searches and seizures is not intended as a limitation upon other than governmental agencies. Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A.L.R. 1159; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. The seizure was not made or authorized by any officer of this state or by any federal agency. The court did not err in denying the motion to suppress the evidence.

The first trial began January 17, 1934, and lasted until February 2. The new trial did not begin until February 13. The principal grounds urged for a continuance of the second trial were that counsel did not have adequate time for preparation, and that he had not been paid for his services in the first trial, and time was needed for adjusting that matter. Pending the second trial, the court appointed the same attorney to represent the defendants who represented them at the first trial, and refused to permit him to decline the appointment. Manifestly, there was no basis for the claim of lack of time to prepare for the second trial. Moreover, the inability of counsel to arrange for his fees could not have been serious. Touhy was the

owner of considerable property including a large and valuable estate in Cook county. There was $2,700 in custody of federal officers which had not been identified as the proceeds of any crime, and this had been assigned to counsel by the defendants. Courts cannot be obliged to wait upon the payment of fees to counsel before bringing an accused to trial, otherwise many miscarriages of justice would result. The defendants were in nowise prejudiced by denying the continuance.

It is claimed that Costner's testimony as to the payment of $2,400 and the conversation about it with Banghart after Factor's release was incompetent, because a conversation out of the presence of the accused, after the termination of a conspiracy, is not admissible. The same claim is made as to the evidence of the police trap at Willow Springs, and it is pointed out that the defendants were then in custody on another charge. The evidence shows that the conspiracy had not terminated. It was a part of the agreement for release that $70,000 should be paid down and $50,000 more should be paid a week or ten days later. All the conspirators are deemed in law to be parties to all acts done by any of the other conspirators in furtherance of the common design. People v. Cohn, 358 Ill. 326; 193 N. E. 150; People v. Walinsky, 300 Ill. 92, 132 N. E. 757. The testimony was properly admitted.

Complaint is made by counsel for the defendants because he was not permitted to interrogate Costner in private prior to his going on the witness stand. Costner was brought from Baltimore to Chicago on February 17 and was called as a witness on the following Monday. Counsel suggested to the court that the name of the witness did not appear in the list given him by the state. The assistant state's attorney explained that when the case was called for trial Costner's whereabouts was unknown and the state was not then in possession of any definite information as to his connection with the case. Thereupon counsel for the defendants moved to withdraw a juror, and the motion was denied. Leave was asked for the defendants' counsel to examine the witness in private. The court offered to permit an examination provided it should be conducted in the presence of the assistant state's attorney or Captain Gilbert. At the end of a colloquy over the matter,

counsel interrogated the witness in the outer chamber of the court in the presence of Captain Gilbert. No prejudice to the defendants appears to have resulted in the action of the court. In fact, we know of no rule which would authorize the court to compel a witness to be examined in private by counsel for either side of a case, especially in the absence of the consent of the witness, and it is not intimated that Costner was either desirous or willing to be interrogated out of the presence of the court. There was no error in permitting the witness to testify. People v. Scott, 261 Ill. 165, 103 N. E. 617.

Clara Sczech was called by the court at the request of the people and testified that she was employed at the Glenview house by Henrichsen to cook one meal a day and straighten up after supper. Andy McFadden, Sharkey, and Tribbles lived there. Kator, Eddie McFadden, and Banghart frequented the place. She admitted making a sworn statement on October 26, 1933, that she had seen Touhy, Connors, and Schafer there, but testified she was so nervous she did not know what to do and made mistakes in her statement. She said she never saw Costner around the place, and that she never saw Factor or anybody else in custody there, and had never heard Factor discussed. It is urged that the court erred in calling her as a court witness. The state's attorney informed the court that prior to the first trial she had made a sworn statement in which she identified pictures of Touhy, Connors, Banghart, and Schafer; that she stated she had seen them at the Glenview house; that on the first trial she contradicted that statement and denied she had ever seen Touhy, Schafer, or Connors there; that she would persist in her denial; and that the state could not vouch for her veracity. In Carle v. People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208, we approved the calling of an eyewitness to a crime for whose veracity the state's attorney could not vouch. Subsequently, in People v. Cleminson, 250 Ill. 135, 95 N. E. 157, a witness called by the court who knew nothing about the crime was subjected to a searching and scurrilous cross-examination on collateral matters. We said in that case that the practice of the court calling a witness at the request of either party should not be extended beyond the limits of the rule announced in the Carle Case, but we have never held that the power of a trial

court to call a witness is limited to the calling of an eye-witness. We have held the rule to be that a witness should not be called except where it is shown that otherwise there may be a miscarriage of justice. Where the state's attorney for some reason, of which he informs the court, doubts the integrity or veracity of a witness he is not obliged to call him, but the court may call the witness and allow him to be cross-examined by either side. The practice should not be extended further than this, and the cross-examination should be limited to the issues. People v. Daniels, 354 Ill. 600, 188 N. E. 886; People v. Rotello, 339 Ill. 448, 171 N. E. 540; People v. Johnson, 333 Ill. 469, 165 N. E. 235. Clara Sczech was employed at a rendezvous of the defendants, rented at Touhy's direction. She was connected with the house and with the defendants. The court was advised of sufficient reasons why the state's attorney could not vouch for her credibility. There was no error in calling her as a court witness.

It is complained that the defendants were not allowed to develop evidence relating to the previous kidnapping of Factor's son, his release without ransom, and the details of a gang war between the Al Capone gang and the Touhy gang concerning the illegal distribution of beer. It is urged that such evidence would tend to show that Factor was kidnapped by the syndicate or that the charge was falsely made in order to escape extradition. In connection with the gang war it is claimed that one of the people's witnesses identified a guard at the Dells as one of the kidnappers, and that the Dells was operated by the Capone gang. The witness did not identify one of the kidnappers as a guard. He testified that he saw the man leaning against a car in the Dells yard and "concluded" he was a guard. There is no other testimony even tending to show that the man was a guard at the resort. The evidence shows that Silvers, the man who twice came out and communicated with the kidnappers just prior to the capture, was in conference with Touhy and his associates on two days shortly afterward. Even though Factor's son was released without ransom from an earlier kidnapping through the efforts of members of the Capone gang, and even though there was a gang war over illegal beer territory, those facts would not tend to throw any light on the issues. It would rather tend to becloud them.

The court did not unduly limit the testimony in the respects complained of.

The instruction given by the court concerning the penalty for kidnapping is not subject to the criticism pointed out in People v. Rongetti, 331 Ill. 581, 163 N. E. 373. There the defendant was charged with abortion, and the instruction covered not only that crime but the crime of attempted abortion as well. The instruction here complained of does not cover two separate offenses. It merely defines the elements of the crime, and the jury could not have been misled by it.

The following instruction was given: "The defendants under the law are presumed to be innocent of the charge in the indictment and this presumption remains throughout the trial with the defendants until you have been satisfied by the evidence in the case beyond all reasonable doubt of the guilt of the defendants. * * * Throughout this case the burden of proving the guilt of the defendants beyond all reasonable doubt is on the State and the law does not require the defendants to prove their innocence."

It is objected that the instruction intimates the presumption need not prevail during the whole trial but only "until something happens." The instruction is unlike the instruction condemned in People v. Ambach, 247 Ill. 451, 93 N. E. 310, and the objection is unfounded. An instruction of similar import but in different language was approved in the Rongetti Case, supra. Instructions are given after the hearing of all the evidence and the arguments of counsel, and we are unable to see wherein the jury could have considered this instruction other than in connection with the whole case.

The court instructed the jury as to the meaning of reasonable doubt. We have often criticised the giving of a similar instruction because the term needs no definition, but thus far we have never held the giving of such an instruction to be reversible error.

An instruction advised the jury that they are the sole judges of the credibility of the witnesses and enumerated the general tests to be considered. It is objected that a different test is to be applied to accomplices, and that it was not within the province of the court to single out and

indicate that a witness may be corroborated or contradicted. This instruction is not subject to either criticism. The tests enumerated were applicable to the testimony of accomplices as well as other witnesses.

The next instruction dealt only with accomplices. It is: "Walter Henrichsen, Isaac Costner and Basil Banghart are persons defined by law to be accomplices to the crime charged in this indictment. The testimony of an accomplice is competent evidence but such testimony is liable to grave suspicion and should be acted upon with great caution. If the testimony of an accomplice carries conviction and the jury are convinced of its truth beyond a reasonable doubt they should give it the same weight as would be given to the testimony of a witness who is in no respect implicated in the offense and *the credibility of such an accomplice is for the jury to pass upon as they pass upon the credibility of any other witness.*"

The only objection made at the trial to this instruction by counsel for the defendants was, "that Basil Banghart does not come in the class of accomplice, not having been called by the State but having been called by defendants." It is argued that there should be a different rule applicable to Henrichsen and Costner, who took the stand for the people and confessed their guilt, than that applicable to Banghart, who testified for the defendants and denied his guilt. Although the term "accomplice" is generally applied to those testifying against their fellow criminals (Cross v. People, 47 Ill. 152, 95 Am. Dec. 474), an accomplice is one who is in some way concerned in or associated with another in the commission of a crime. Bouvier's Law Dict.; People v. Turner, 260 Ill. 84, 102 N. E. 1036, Ann. Cas. 1914B, 144; Cross v. People, supra. No reason is advanced, and none is apparent, why one who is in fact an accomplice should not have his testimony scrutinized carefully before it is relied on, no matter on which side of the case he testified.

It is urged that the portion of the above instruction which we have italicized renders it reversible error under the holding in People v. Rongetti, 338 Ill. 56, 170 N. E. 14. In that case the instruction was held to be erroneous because it charged the jury to pass upon the credibility of an accomplice in the same way as they pass upon the credi-

bility, of any other witness. The accomplice testified for the state, and the defendant had a right to have the jury instructed that his testimony should be put to a severer test than that which is applied to ordinary witnesses. The defendant was prejudiced by the omission to so instruct the jury, but in this case, Banghart, who is the only witness referred to in the objection, was a witness for the defendants, and if the jury were not required to apply strict scrutiny to his testimony the result would favor the defendants and they cannot complain of the error. Counsel for the defendants urge other objections to the instruction, but they were not included in the specific objection made in the trial court, and they will not be further considered.

Some of the evidence was circumstantial, and the court did not err in giving an instruction defining it. Nor was there any error in giving the instruction defining accessories. Some of the defendants who were not placed at the scene of the actual kidnapping by the people's witnesses were connected by the testimony with other phases of it, bringing them within the terms of the definition.

The jury were instructed that if they believed from the evidence, beyond all reasonable doubt, that any defendant in this case collected or attempted to collect ransom or money from John Factor knowing him to have been so seized or secreted for the purpose of collecting ransom, such defendant is guilty of kidnapping for ransom. The objection raised to the instruction in the trial court is, that it would include an accessory after the fact and is misleading. It is urged that under its language it is possible to connect the attempt to collect money at Willow Springs with the original crime. If the testimony is to be credited that incident was a part of the crime and those engaged in it were participants in the whole program. The instruction might well have been couched in better language, but it was not misleading, and there was no reversible error in giving it.

In addition to adopting five suggestions offered by the defendants, the court refused 32 others offered by them. Fourteen of the offered suggestions were on the question of the credibility of the witnesses and the weight to be accorded the testimony of accomplices. One was on the

failure of the defendants to testify. Others were on reasonable doubt. Each of these subjects and other suggestions offered were covered by other given instructions. We have often condemned the practice of giving numerous instructions upon the same subject. There was no error in refusing the suggestions.

An alibi suggestion offered by the defendants told the jury that: "If in view of all the evidence, the jury have a reasonable doubt as to whether either of the defendants was present but was in some other place when the crime was committed, they should give such defendant or defendants the benefit of the doubt and find them not guilty." It was not necessary for a defendant to be actually present at the kidnapping if he was otherwise a party to the crime. The suggestion was correctly refused.

After a careful consideration, we are of the opinion there was no reversible error in the giving or refusal of instructions.

In support of the contention that the evidence is not sufficient to show the defendants' guilt beyond a reasonable doubt, the sufficiency of the identifications and the testimony of the accomplice witnesses are particularly attacked. Several matters alleged to be discrepancies are urged. It is always to be expected that in a case where the evidence is as voluminous as this there will be some conflict in the testimony. The identifications are not disputed. The jury saw and heard all the witnesses, including the accomplices. The weight of the testimony was for the jury to determine. The evidence so overwhelmingly establishes the guilt of the defendants that the jury could not reasonably have arrived at any other verdict.

We have examined in detail the many objections and criticisms urged upon us, and find no reversible error. The question upon review is not whether the record is perfect, but whether the defendant has had a fair trial under the law, and whether his conviction is based on evidence establishing his guilt beyond a reasonable doubt. Where the error complained of could not reasonably have affected the result the judgment will be affirmed. People v. Cardinelli, 297 Ill. 116, 130 N. E. 355; People v. Haensel, 293 Ill. 33, 127 N. E. 181.

The effort to show partisanship and bias on the part of the trial judge is wholly unjustified. His rulings, in the main, were correct, and we find no prejudicial error in any of them. The defendants were accorded a fair trial, and the jury were justified from the evidence in finding them guilty beyond a reasonable doubt.

The judgment of the criminal court is affirmed.

Judgment affirmed.